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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ERIC LOPEZ, Defendant and Appellant.	G050956 (Super. Ct. No. 10HF0688) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Steven D. Bromberg, Judge. Affirmed.

Siri Shetty, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Eric Swenson and Barry Carlton, Deputy Attorneys General, for Plaintiff and Respondent.

Eric Lopez appeals from the judgment of conviction in this case, arguing the trial court erred by *staying* one of two alternative sentencing schemes pursuant to *People v. Lopez* (2004) 119 Cal.App.4th 355 (*Lopez*), rather than *striking* that scheme pursuant to *People v. Snow* (2002) 105 Cal.App.4th 271 (*Snow*). At other points in his brief, Lopez claims it is a "one strike *enhancement* [that] should have been stricken rather than stayed," that "the *allegation* under [Penal Code] section 667.61 should be stayed rather than dismissed" and that "the One Strike" *finding* should be stricken. (Boldface omitted, italics added.) The Attorney General responds by asserting the entire issue is moot because a "stayed *sentence* is not punishment" and it makes no difference whether *the sentence* is stayed or stricken. (Italics added.)

We find no reversible error in this case, but a significant amount of confusion surrounding the issue raised. Nobody—not the parties before us nor the courts in *Snow* and *Lopez*—are quite talking about the same thing. That alone demonstrates the issue should not be disregarded as moot.

We conclude that while a *sentence*, once imposed, might be stayed or stricken (as appropriate) a statutory *sentencing scheme* cannot be. The scheme exists, and is operable, in the abstract; hence, a trial court's declaration that an alternative "scheme" is stayed has no fixed legal meaning. That is the only error allegedly committed by the trial court in this case. Significantly, what the court *did not do* was impose two separate base terms for the same crime, as the trial court did in *Snow*. Instead, the record reflects the trial court imposed only one base term, under Penal Code section 667.71,[1] for each of the two offenses to which it applied, and did not impose additional punishment based on section 667.61, the alternative sentencing scheme also found applicable to the offenses. Had the court imposed two base terms for a single offense, we would agree the proper remedy would be to strike, rather than stay, that

[1] All further statutory references are to the Penal Code.

duplicative punishment. Nor did the trial court here strike *factual findings* made in connection with the alternative sentencing scheme not chosen, as condemned in *Lopez*. The court did state, citing *Lopez*, that "the unused sentencing scheme is stayed and not dismissed," but as we have already noted, that statement has no fixed meaning, and we conclude it inflicted no harm on Lopez in this case. We consequently affirm the judgment.

FACTS

Lopez was convicted of five felonies: domestic battery with injury (§ 273.5) (count 1); two counts of making a criminal threat (§ 422) (counts 3 & 4); forcible rape (§ 261, subd. (a)(2)) (count 5); and forcible oral copulation (§ 288a, subd. (c)(2)) (count 6).[2] In connection with counts 5 and 6, the jury found true that Lopez kidnapped his victim, which qualified him for sentencing on those counts under section 667.61, subdivisions (b) and (e)(1). And the court stated that "[b]ased on the evidence and the gravity of counts 5 and 6, based on [Lopez's] prior conduct, the court does find it to be true that [Lopez] is a habitual sex offender" as defined in section 667.71. The court struck one of Lopez's strike priors, but refused to strike the other.

The court concluded "section[s] 667.61 and 667.71 are mutually exclusive to each other and are alternative sentencing schemes," and stated that with respect to counts 5 and 6, it would "make an election as to appropriate code section for sentencing." The court then chose section 667.71 as the appropriate sentencing scheme.

The court sentenced Lopez on counts 5 and 6 in accordance with section 667.71, as follows: "As to count 5, an indeterminate count, [Lopez] is sentenced to state prison for the term prescribed by law, which is an indeterminate term of life, which is 50 years to life. The basis being the 25 years to life pursuant to [section] 667.71 [subdivision] (a)(1), and doubled as a result of the strike. [¶] As to count 6, also an

[2] Lopez was also tried on an additional count of making a criminal threat (count 2 of the amended information), but the jury returned a verdict of not guilty on that count.

indeterminate count, [Lopez] is sentenced to state prison for the term prescribed by law, which is an indeterminate term of life, which is 50 years to life. The basis being 25 years to life pursuant to [section] 667.71 [subdivision] (a)(1), and doubled as a result of the strike."

The court did not impose any sentence pursuant to section 667.61 with respect to either count 5 or count 6. Instead, the court stated that "pursuant to . . . *Lopez*, . . . *the unused sentencing scheme is stayed and not dismissed.*" (Italics added.)

The court also sentenced Lopez to the following determinate terms: six years on count 1, which it designated as "the primary determinative count," to run concurrently to the sentence on count 5; four years on count 3, to run consecutive to count 5; four years on count 4, to run concurrent to count 5. The court also imposed an additional and separate five-year term as to counts 5 and 6, for the section 667.5, subdivision (a)(1) prior convictions. The court struck Lopez's section 667.5, subdivision (b) priors.

DISCUSSION

Lopez raises only one issue in this appeal. He contends the trial court erred by staying the "unused one strike scheme" pursuant to *Lopez* rather than striking or dismissing it under *Snow*. Both *Snow* and *Lopez* agree that section 667.61 (the "One Strike law" (*People v. Mancebo* (2002) 27 Cal.4th 735, 738)) and section 667.71 (the "habitual sexual offender" law (*People v. Murphy* (2001) 25 Cal.4th 136, 140)) are alternative schemes for calculating the base terms for specified offenses. (*Snow*, *supra*, 105 Cal.App.4th at p. 282; *Lopez*, *supra*, 119 Cal.App.4th at p. 360.)

However, from that point the two cases diverge—largely because they address different issues. As we explain, we agree with *Snow* that the trial court errs when it imposes two separate base terms for the same crime, under alternative sentencing schemes, but we cannot agree with the *Snow* court's statement, in dicta, that the unused

sentencing *scheme* should be dismissed, or with its decision to vacate the trial court *finding* that justified application of the unused sentencing scheme. Neither is supported by the authority it relies on. Instead, we agree with *Lopez* that the trial court should not strike *findings* merely because they support an unused alternative sentencing scheme, although we disagree with its additional suggestion, in dicta, that the trial court "could have" imposed an additional base term, and then stayed it, as a "'fallback'" sentence. (*Lopez*, *supra*, 119 Cal.App.4th at p. 366.)

In *Snow*, the trial court sentenced Snow to a prison term of 85 years to life, consisting of a 25-year-to-life term under the One Strike law, which it then tripled under the "Three Strikes" law, plus a 10-year consecutive term for the two prior serious felony convictions. However, the court also found Snow "was a habitual sex offender within the meaning of section 667.71, subdivisions (a), (c)(4) and stayed under section 654 execution of sentence on the finding he was a habitual sex offender.

Thus, the *Snow* court was confronted with the issue of whether it was appropriate for the trial court to impose, but stay execution of, an alternative base term for the offense the defendant had been convicted of. The court concluded it was not, relying largely on *People v. Johnson* (2002) 96 Cal.App.4th 188 (*Johnson*), disapproved on another ground in *People v. Acosta* (2002) 29 Cal.4th 105, 134, footnote 13. As support for striking the duplicative term, *Johnson* cited *People v. Jones* (1993) 5 Cal.4th 1142 (*Jones*), in which the Supreme Court held it was improper for the trial court to have imposed sentence enhancements under both sections 667 and 667.5 for the same prior offense. (*Jones*, at p. 1169.) And having concluded that, the Supreme Court in *Jones* ordered the case remanded to the trial court with directions to strike the one-year enhancement of the defendant's sentence for his prior offense of kidnapping under subdivision (b) of section 667.5, and to send to the Department of Corrections a corrected abstract of judgment.

Based on *Johnson*, *Snow* concluded "the sentencing court has discretion to choose one of the sentencing schemes and then must strike or dismiss, rather than stay, *the sentence* under the other." (*People v. Snow* (2003) 105 Cal.App.4th 271, 283, italics added.) *Snow* then goes on to say, somewhat inconsistently, that "[t]he sentencing *scheme* not imposed is to be dismissed" (*ibid.*, italics added) and then "vacate[s] the habitual sex offender true *finding*." (*Id.* at p. 284, italics added.) Those latter statements go beyond the reasoning of *Johnson*, which says nothing about dismissing a *sentencing scheme*, and instead explicitly acknowledges that it is the alternative *sentence* which may be stricken, not the *finding* supporting it: "Although it has been determined that a trial court has *no authority to strike any of the circumstances* specified in subdivision (d) of section 667.61 once they have been pled and proved [citations], nothing in section 667.61 precludes a court from striking *the punishment for those circumstances* where the defendant is sentenced under an alternative sentencing scheme." (*Johnson*, *supra*, 96 Cal.App.4th. at p. 209, fn. 13, italics added.)

In *Lopez*, the court was presented with an appellant who had been sentenced under only one of the two alternative schemes—the habitual sexual offender law—but who argued, based on *Snow*, that the trial court should have also dismissed or struck the multiple victim special circumstance *finding* made pursuant to the one strike law. (*Lopez*, *supra*, 119 Cal.App.4th at pp. 358-359.) The *Lopez* court rejected that argument for three reasons. First, it analogized the alternative sentencing schemes to two alternative enhancements, and concluded the correct procedure would be to "impose a sentence on the barred enhancement, but then stay execution of that sentence" under the authority of California Rules of Court, rule 4.447. (*Lopez*, at p. 364.) The *Lopez* court acknowledged that such a stay "has no express statutory basis. It is implied, so that a defendant who is subject to one of two alternative punishments will not be wrongly subjected to the other; if, however, one of the two punishments is invalidated, the defendant will still be subject to the remaining one." (*Id*. at p. 365.)

But that analysis addresses the propriety of imposing and staying one of two alternative enhancement *sentences*, which was the issue presented in *Snow*; it says nothing about the issue before the *Lopez* court, which was the propriety of striking unused *findings*. But the *Lopez* court's second and third justifications do address that issue, pointing out that (1) striking findings made in support of the one strike law would violate the law itself, which includes "the unequivocal command that 'the court shall not strike' any special circumstance finding under the one strike law" (*Lopez, supra*, 119 Cal.App.4th at p. 366);[3] and (2) there was no affirmative reason *for* striking them. (*Ibid*.)

Having disposed of the issue before it, *Lopez* goes on to suggest, in *dicta*, that "the trial court could have imposed a 'fallback' sentence under the one strike law, then stayed it, with the stay to become permanent upon defendant's service of his actual sentence under the habitual sexual offender law." (*Lopez, supra*, 119 Cal.App.4th at p. 366.) However, while that conclusion might well be correct when considering the proper disposition of alternative *enhancements*—the situation *Lopez* analogizes to—both the one strike law and the habitual sexual offender law establish alternative *base terms* for the same offense. They are not enhancements. (See *People v. Jefferson* (1999) 21 Cal.4th 86, 101 ["A sentence enhancement is 'an *additional term* of imprisonment added to the base term'"]; *People v. Fuller* (2006) 135 Cal.App.4th 1336, 1343 [section 661.61 is "an alternative, harsher sentencing scheme for those to whom it applies, not an enhancement"].)

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[3] In reaching that conclusion, *Lopez* makes the same point acknowledged in *Johnson*, which as previously noted, drew a clear distinction between the striking of an extraneous *sentence* and the striking of extraneous *findings*. Unfortunately, *Lopez* mischaracterizes *Johnson* as a case "holding that, when both the one strike law and the habitual sexual offender law apply, the trial court must sentence under one and must strike the finding under the other." (*Lopez, supra*, 119 Cal.App.4th at p. 362.) *Johnson* says no such thing. Instead, as we have already pointed out, it states that a duplicative *sentence* imposed under an alternative sentencing scheme must be stricken, while expressly acknowledging that *findings* made in connection with that alternative sentencing scheme should not be. (*Johnson, supra*, 96 Cal.App.4th at p. 209, fn. 13.)

While there might be several enhancements applied to a single offense, there can be only one *base term* imposed. To impose alternative base terms under both the one strike law and the habitual sexual offender law would be tantamount to a court imposing the upper term determinate sentence for an offense, and then *also* imposing the midterm for the same offense—but staying execution of that midterm—just in case its justification for selecting the upper term does not withstand appellate scrutiny. There is no authorization for such a duplicative sentence. (See § 1170, subds. (a)(3) & (b).) It is for that reason we conclude *Snow* was correct in finding it was error for the trial court to have *imposed* a sentence under both the one strike law, and the habitual sexual offender law, even though it stayed execution of the latter.

In the instant case, however, the trial court *did not* impose base terms under both the one strike law and the habitual sexual offender law. Thus, it did not commit the error rectified in *Snow*. And having avoided that error, the court had no occasion to either strike or stay the resulting duplicative *sentence*, which is the dilemma the Attorney General suggests to us would have presented a moot issue. Consequently, we need not address that contention. Nor did the trial court strike any *findings* made in connection with the alternative sentencing scheme it chose not to apply, and thus the court avoided running afoul of *Lopez*.

Instead, the only error which the trial court is alleged to have committed is that it purported to stay, rather than dismiss, the unused sentencing *scheme* pursuant to *Lopez*—albeit while employing terminology actually found in *Snow*, rather than in *Lopez*. (*Snow*, *supra*, 105 Cal.App.4th at p. 284.) However, as we have already noted, such a pronouncement has no established legal significance. The statutory scheme continues to exist, continues to be effective, and remains an *applicable* sentencing alternative in this case. It was just not the available alternative the trial court actually *applied*. Indeed, we infer the court's pronouncement of a stay, rather than a dismissal, of the unused sentencing scheme was intended to make that very point: i.e., that the one strike law

remains applicable, even though not applied, in this case. We find no error in that pronouncement.

DISPOSITION

The judgment is affirmed.

THOMPSON, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

IKOLA, J.